

PUBLIC VERSION

Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

Protest of)
)
Northrop Grumman Systems Corporation) Docket No. 06-ODRA-00384
)
Solicitation No DTFAWA-06-R-120906)

DECISION ON PROTESTER’S REQUEST FOR SUSPENSION

This matter arises from a bid protest (“Protest”) that was filed on September 1, 2006 by Northrop Grumman Systems Corporation (“Northrop”) with the Federal Aviation Administration (“FAA”) Office of Dispute Resolution for Acquisition (“ODRA”). The Protest challenges the award by the Program Office of a contract (“Contract”) to the Raytheon Company (“Raytheon”) for the design, production, testing and implementation of a Service Life Extension Program for the FAA Long Range Radar System (“LRR SLEP”). Raytheon has intervened in the Protest. Northrop’s Protest includes a request for a suspension (“Suspension Request”) of actions or activities related to the Contract. *See Northrop Protest* at 4, 5. Both the Program Office and Raytheon have opposed the Suspension Request and Northrop has replied to the Oppositions. As discussed below, the ODRA finds no compelling reason to support the issuance of a suspension during the pendency of this Protest. The ODRA, therefore, declines to impose a temporary stay and will not recommend that the FAA Administrator issue a suspension pending the resolution of this Protest.

PUBLIC VERSION

I. FACTUAL BACKGROUND

Northrop's Protest challenges the Program Office's evaluation of proposals, its best value determination, and its award decision as irrational and inconsistent with the Solicitation's established evaluation criteria. According to Northrop, the evaluation record in this case reveals errors by the Program Office that include: unsupported evaluation conclusions and irrational scoring of Northrop's proposal; disparate treatment of Northrop; waiver of a stated requirement in favor of Raytheon; and an improper cost/ technical tradeoff analysis. *See generally Northrop Protest* at 2.

In support of its Suspension Request, Northrop argues that "should the Protest be sustained, Northrop Grumman may find itself without an adequate remedy if the FAA is unable or unwilling to terminate such an improperly awarded contract." *Northrop Protest* at 4. Northrop further argues that "without the stay of performance, Raytheon may be able to perform enough development work to allow it to propose a more competitive delivery schedule if the procurement is reopened." *Id.* at 5.

In accordance with the OIRA Procedural Regulations, *see OIRA Procedural Regulations*, 14 C.F.R. § 17.17(a), Northrop was permitted to file a written Reply to the Program Office Opposition (hereinafter, "*Northrop Reply*"). The *Northrop Reply* expands on the arguments made in its Suspension Request. Northrop asserts that its Protest alleges a substantial case, *i.e.*, one that would provide a fair ground for litigation and a more deliberative investigation. *Northrop Reply* at 2. Northrop emphasizes that its Protest "raises multiple issues regarding the FAA's evaluation of proposals and source selection decision. These are familiar 'bread-and-butter' protest allegations that the OIRA clearly has jurisdiction to consider." *See Northrop Protest* at 3. Northrop further asserts that [DELETED] "if OIRA sustains even one of Northrop Grumman's Protest grounds, it is very likely that the resulting evaluation adjustment will result in an award to Northrop Grumman." *Id.* at 4. Northrop's Reply also argues that it would be irreparably

PUBLIC VERSION

harmful in the absence of a suspension; that the relative hardships on the parties favor suspension; and that the public interest warrants a suspension. *Id.* at 4 – 15.

The Program Office Opposition to the Suspension Request was filed with the ODRA on September 7, 2006. The Opposition asserts that: Northrop has failed to allege a substantial case or irreparable injury; the relative hardships do not favor a suspension; and the public interest would not be served by the issuance of suspension. *See Program Office Opposition* at 3 – 5. The Program Office asserts that Northrop Grumman’s allegations are “based on speculation and erroneous assumptions”. *See Program Office Opposition* at 3. With respect to irreparable injury, the Program Office asserts that Northrop’s allegations “are all unsupported regarding the injury that [Northrop] would suffer” *Program Office Opposition* at 4. The Program Office goes on to note that in the event the Protest is successful “there would be nothing to stop the Agency from taking corrective actions ordered by the Administrator” *Id.* The Program Office recognizes that “it is the responsibility of the Product Team to ‘mitigate potential cost to the Agency’”. *Id.*, quoting from *Protest of Raytheon Technical Services*, 02-ODRA-00210.

Additionally, the Program Office makes a supported showing that the relative hardships on the Government would be great in the event of a suspension; and that the public interest supports continuation of contract performance during the pendency of the Protest. *See Program Office Opposition* at 5. The Program Office included with its Opposition an Affidavit of the LRR SLEP Program Manager. The Affidavit states, among other things, that “the LRR SLEP Program is a critical element in the modernization of the Nation’s long range surveillance network which supports many critical missions for multiple government departments and agencies.” *See id.*, *Affidavit of Mr. James Pette*, ¶ 4 at 1. The Affidavit goes on to state that: “these radars are located throughout the contiguous United States and are vital to the successful conduct and execution of multiple DOD and DHS missions.” *Id.*, ¶ 6 at 1. Finally, the Affidavit addresses the issue of additional costs that could be incurred in the event that the Protest is sustained. The Program Manager states:

PUBLIC VERSION

If for some the reason the Protest were to be sustained within the next 45 to 60 days, the milestone payment structure in the LRR SLEP contract, mitigates the potential cost(s), if any, to the FAA. Again, however, I must emphasize that the lost time during the protest process, would negatively impact the vital mission objective of not only the FAA but the mission of DOD and DHS as identified in Paragraph 6 above.

See Id., ¶ 16 at 3.

In accordance with the ODR A Procedural Regulations, 14 C.F.R. § 17.17(a), Counsel for Raytheon also was permitted to respond to the Suspension Request. That response (“Raytheon Response”) joins in the Program Office Opposition. Raytheon points out that the current situation “is readily distinguishable from those cases, in which, because of the nature, timing, or anticipated completion of the work involved, termination or replacement of the awardee might have been impractical.” *Raytheon Response* at 3. Raytheon further points out that Northrop’s argument, regarding the allegedly flawed source selection and additional costs which may be incurred if the selection is overturned, consistently has been rejected by the ODR A as a basis for issuance of a suspension. *See Raytheon Response* at 4. Raytheon further asserts that the relative hardships on the parties would support continued contract performance and that the public interest would best be served by not issuing a suspension. *Raytheon Response* at 7, 8.¹

II. DISCUSSION

Under the Acquisition Management System (“AMS”) there is a strong presumption that procurement activities and contract performance will continue during the pendency of a bid protest. *See Protest of Knowledge Connections, Inc.*, 06-TSA-024, *Decision on Request for Suspension of Activities*, April 21, 2006; *Protest of All Weather, Inc.*, 04-ODRA-00294, *Decision on Protester’s Request for Stay of Contract Performance*, February 4, 2004; *Protest of J.A. Jones Management Services*, 99-ODRA-00140, *Decision on Protester’s Request for Stay of Contract Performance*, September 29, 1999. As a result, procurement activities and contract performance will not be stayed or

¹ Raytheon’s Opposition also contains a Motion for Summary Dismissal of a ground of the Northrop Protest and a request that discovery be limited. The ODR A has scheduled separate briefings on those issues.

PUBLIC VERSION

suspended during a protest absent a showing of compelling reasons. *Protest of All Weather, Inc. supra*; See also *ODRA Procedural Regulations*, 14 C.F.R. 17.13(g).

In reviewing requests for suspension, the ODRA applies a four part test established by the United States Court of Appeals for the District of Columbia Circuit in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F. 2nd 841, 844, (D.C. Cir. 1997). Under that test the ODRA considers: (1) whether the protester has made a substantial case, *i.e.*, one that provides a fair ground for adjudication and deliberative investigation; (2) whether the issuance of a stay or lack of a stay is likely to cause irreparable injury; (3) the relative hardships on the parties that would result from a stay or the lack of a stay; and (4) the public interest. In completing this 4-part analysis, greater emphasis is placed on the second, third, and fourth parts of the test. *Protest of All Weather, Inc., supra*.

A. Northrop Has Alleged A Substantial Case

As noted above, Northrop's Protest involves a multi-faceted challenge to the Program Office's evaluation process and the source selection decision. Several of the allegations, if proven, could establish serious flaws in the conduct of the procurement process and provide a basis for sustaining Northrop's Protest. In this regard, consideration of the substantial case factor does not require a finding of "ultimate success by the movant." Rather, "[i]t will ordinarily be enough that the Protester has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." See *Protest of Northrop Grumman Communications, Decision on Northrop's Request for Suspension of Contract Performance*, October 9, 1998 at 4, citing *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d. Cir. 1953). Here the ODRA concludes that a "substantial case" within the meaning of the test has been met as the allegations constitute "a fair ground for litigation and thus for more deliberative investigation." See *Washington Metropolitan Area Transit Commission v. Holiday Tours, supra*.²

² In finding that a substantial case within the meaning of the test for suspension has been alleged, the ODRA notes that Northrop's protest, in several places, makes allegations based on what amounts to its

PUBLIC VERSION

B. The Three Remaining Factors Do Not Support a Suspension

It is well established that the “substantial case” portion of the suspension analysis is de-emphasized in favor of a balancing of the remaining three factors, *i.e.*, irreparable injury, relative harm and the public interest. *See Knowledge Connections, Inc., supra*. Each of these is discussed herein.

Northrop argues that irreparable injury will occur in the absence of a suspension in that Raytheon “would gain an unfair competitive advantage because, as a result of the Government-funded Raytheon development effort during the protest, Raytheon could submit a more competitive proposal, [DELETED] *See Northrop Reply* at 5. Secondly, Northrop asserts that the Government would be irreparably injured because “ if Raytheon is permitted to perform during the protest and thereby expend limited DoD and DHS funds, those funds will be wasted if the procurement is re-opened and an award is made to Northrop Grumman....” *Northrop Reply* 6-7. These arguments would require the ODRA to stop contract work, on what the record establishes is a radar system that is needed for national security, based on assumptions that the Protest will be sustained and the competition reopened. The arguments also would require the ODRA to accept, as true, Northrop allegations regarding the state of Raytheon’s readiness to provide the procured deliverables. The ODRA is unwilling to make such assumptions and findings in considering whether to recommend a suspension. Moreover, Northrop’s arguments do not approach an adequate showing of likelihood of irreparable injury in the absence of a stay. The nature of this contract is such that, if Northrop prevails in this protest, the full range of remedies potentially would be available. Thus, this case is distinguishable from those in which no adequate remedy would reasonably be available in the absence of a suspension. *See e.g., Protest of Mid Eastern Builders, Inc., 05-ODRA-00330, Decision on Suspension Request* dated January 28, 2005.

suspensions or beliefs. The Protester is reminded that it ultimately bears the burden of establishing the facts underlying its protest grounds.

PUBLIC VERSION

Notably, while the record shows that a general suspension of the contract would cause hardships to the Program Office and its current mission, there has not been any convincing demonstration by the Protester that similar hardship would inure to Northrop were contract performance to continue. The chief argument advanced by Northrop under this factor is that allowing Raytheon “to perform, at Government expense, development effort for its proposed solution” will allow Raytheon to “gain an unfair competitive advantage.” See *Northrop Reply* at 5. The ODRA finds this argument unpersuasive. It is based solely on speculation, and otherwise is similar to an objection raised by a protestor to an alleged competitive advantage of an incumbent contractor. A potential competitive disadvantage, by itself, does not demonstrate hardship. In this regard, it is well established that a contracting agency is not required to compensate for every competitive advantage inherently gleaned by a competitor’s performance of a particular requirement. See *Protest of Raytheon Company*, 01-ODRA-00177; see also *NANA Services, LLC*, Jan. 3, 2006, B-297177.3, B-297177.5, 06-1 CPD ¶ 4.³ Given the importance of this work to national security, and the lack of a showing of a non-speculative hardship to Northrop, the ODRA concludes that the hardship factor does not support the issuance of a suspension order here.

Finally, the public interest overwhelmingly favors continuing this work and promptly adjudicating Northrop’s Protest. The record establishes that halting ongoing performance of the work at this stage would be disruptive and undermine the public interest in national security. *Protest of Knowledge Connections, supra*. The Program Office, by choosing to continue with the contract work, notwithstanding the allegations of the Protest, assumes the risk and the responsibility for additional costs that may be incurred if the Protest is sustained and the work eventually is awarded to Northrop.⁴ Furthermore, the record

³ While Northrop has cited several decisions by the Court of Federal Claims to support suspending this contract on the basis of Northrop’s asserted competitive disadvantage, the ODRA finds these authorities inapposite as the suspensions were granted under an acquisition system that requires an automatic stay. See *PGBA v. U.S.*, 57 Fed. Cl. 655 (2003). In contrast—and as noted above—the AMS includes a presumption in favor of continuing procurement activity and contract performance during the pendency of bid protests. See *Protest of Informativa of America*, ODRA Docket No. 99-ODRA-00144, *Decision on Request for Contract Suspension* dated October 8, 1999.

⁴ Northrop’s Reply also suggests that a suspension of contract performance is warranted because the Raytheon award price exceeds “available” funds. As a preliminary matter, Northrop has failed to proffer

PUBLIC VERSION

establishes that the structure of the contract will allow for mitigation of damages in the event the Protest is sustained. *See Pette Affidavit*, ¶ 16 at 3.

III. CONCLUSION

For the foregoing reasons, the ODRA concludes that no compelling reasons exist to suspend contract performance during the pendency of the Protest and that compelling reasons exist to continue contract performance. The ODRA therefore declines to order a temporary suspension and will not recommend that the FAA Administrator permanently suspend contract performance pending the outcome of this Protest.

_____/S/
Anthony N. Palladino
Director
Office of Dispute Resolution for Acquisition

September 14, 2006

any evidence of a funding shortage for the base period of contract performance—and there could be multiple funding sources available from several federal agency stakeholders’ appropriations. Moreover, it has been well recognized by the United States Comptroller General that a contracting agency need not be “clairvoyant” in forecasting the availability of option year funding, and that proceeding in the face of an apparent funding shortage is not objectionable unless the agency knows with “reasonable certainty” that options will not be funded. *See e.g., Charles J. Merlo*, B-277384, 97-2 CPD ¶ 39.